Tentative Rulings for September 7, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG03862 ***Barajas v. Gursaran et al.*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG02305 ***Stevenson v. Community Medical Centers*** **is continued to Thursday, September 22, 2016, at 3:30 p.m. in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

Tentative Ruling

(20)

Re: ***Parmelee v. Driveline Retail Merchandising, Inc.***
Case No. 14CECG01131

Hearing Date: September 7, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Final Approval of Class Action Settlement; Motion for Attorneys' Fees

Tentative Ruling:

To grant final approval of the class settlement. To set March 21, 2017 at 3:30 p.m. in this Department as hearing date for amended judgment pursuant to Code Civ. Proc. § 384. A of verified report of payouts of settlement funds and a proposed amended judgment shall be submitted no later than March 6, 2017.

To grant attorney's fees in the sum of $333,300, and to reduce the award of costs from $19,798.96 to $14,198.96. To grant administrator fees as requested.

Explanation:

The class has approved the settlement; the evidence shows there are but two opt-outs, out of 1,261 class members, and no objections. The Court grant finals approval of the settlement.

Based on prior authority providing that California does not use the percentage of the common fund method for determining fees (*Dunk v. Ford Motor Company* (1966) 48 Cal.App.3d 1794, 1809-1810), the motions were continued to September 7 and counsel directed to provide the court with detailed billing entries to enable the court to calculate the Lodestar. A few days after the initial hearing on these motions, the California Supreme Court ruled that trial courts can use the percentage method for its primary calculation of attorney's fee awards in cases like this, where the settlement provides for a true common fund without any reversion of settlement proceeds to the defendant. (*Laffitte v. Robert Half Intern. Inc.* (2016) 2016 WL 4238619.) In light *Laffitte*, and the fact that class counsel's Lodestar with a 1.38 multiplier would equal the 33% of the settlement fund requested, the court intends to grant the motion for attorneys' fees.

The court will only award half of the mediator's fees, which total $11,200 for two days of mediation. It appears that the entire mediator's fee was billed to plaintiffs. The court expects both sides to split the mediator's fee. Instead, it appears that the entirety of the fee is being shifted to plaintiffs to be paid out of the settlement.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 09/06/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: Padron v. City of Parlier
Court Case No. 16CECG00211

Hearing Date: **September 7, 2016 (Dept. 403)**

Motion: Plaintiff's Motion to Amend

Tentative Ruling:

To grant plaintiff's motion under Code of Procedure section 474 rather than Code of Procedure section 473. Plaintiff may file the document attached as an exhibit to his complaint, but he is directed to first change the caption of this document (i.e., the information on the face page directly under the case number) to read "Amendment to Complaint" in place of the full caption of the original complaint. Defendant Hilda Johnson-de la Fuente is not required to respond to the complaint unless and until she is properly served with process.

Explanation:

It is clear to the court that plaintiff is attempting to substitute the names of Hilda Johnson-de La Fuente and Israel Lara for the defendants designated in the complaint as "City Employee" and "City Manager," respectively. With both defendants plaintiff did not use actual names, and his declaration filed in conjunction with the motion sufficiently establishes that he did not know either name when he filed the complaint: he states he is making this motion to "identify the defendants properly" and that the need to amend "was discovered" after the complaint was filed. However, he brought the motion under Code of Civil Procedure section 473, which is generally not used for this purpose; instead, the proper statute is Code of Civil Procedure section 474.

Code of Civil Procedure section 474 provides: "When the plaintiff is ignorant of the name of a defendant, he **must state that fact in the complaint**…and such defendant may be designated in any pleading or proceeding **by any name**, and when his true name is discovered, the pleading or proceeding must be amended accordingly." (*Id.*, Emphasis added.) "The purpose of section 474 is to enable a plaintiff to avoid the bar of the statute of limitations when he [or she] is ignorant of the identity of the defendant." (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 386.) "When a defendant is properly named under section 474, the amendment relates back to the filing date of the original complaint." (*McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371.)

The "City Manager" defendant, Israel Lara, has already answered and has indicated he was "erroneously sued herein as CITY MANAGER." As for the "City Employee," there are numerous and specific allegations in the Complaint regarding this person. (See, *e.g.,* Compl., ¶¶ 14-15, 17-20, 24-26.)

As noted above, there are two requirements allowing a plaintiff to avail himself of the amendment procedure in Code of Civil Procedure section 474: 1) plaintiff must state in the complaint that he is ignorant of the name of the fictitiously named defendant; and 2) he must designate that defendant in the complaint "by any name." Plaintiff has met the second requirement, as he has designated two fictitious names in his complaint, "City Manager" and "City Employee." While usual pleading practice is to use the term "Doe" along with a number (i.e., "Doe 1"), that name usage is not required; plaintiff's pleading practice was acceptable.

The complaint does not allege that plaintiff is ignorant of the name of the fictitiously named defendant. However, provided the statute of limitations has not yet run, an amendment pursuant to Code of Civil Procedure section 474 cannot be challenged on the ground plaintiff was not "truly ignorant" of defendant's identity when the complaint was filed, the rationale being that plaintiff could have sought leave to amend the complaint to *add* that person as a defendant rather than serving him or her as a "Doe." To treat the "Doe" amendment differently "would elevate form over substance and would ignore common sense." (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 387.) Here, the defendants who have already appeared did not challenge the pleading on statute of limitations grounds, either by demurrer or in their answer, and it does not appear evident that any statute of limitations has yet run. Furthermore, as the court has found above, plaintiff's declaration under penalty of perjury adequately establishes that he <u>was</u> "truly ignorant" of defendants' identities.

The court has the inherent power to manage and control its docket. (Code Civ. Proc. §§ 128, 187.) The court could simply deny this motion without prejudice to plaintiff to refiling the motion under Code of Civil Procedure section 474, or it could insist that no such motion could be granted until plaintiff first moved to amend his complaint to add the "ignorance" allegation, based on his mistake, inadvertence, and/or excusable neglect (as it appears evident to the court *he would be able to do*). But this would not be an efficient use of either the parties' or the court's time where, in the end, it appears plaintiff would be entitled substitute Ms. Johnson-de La Fuente as defendant in place of "City Employee." Granting the relief requested will not prejudice any defendant and is in the interests of justice as this efficiently achieves that end while preserving scarce judicial resources, as well as the parties' financial resources.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: <u>KCK</u> on <u>09/06/16.</u>

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Superior Court Case No.: 14CECG00572

Hearing Date: September 7, 2016 (**Dept. 403**)

Motions: (1) By Plaintiffs/Cross Defendants Peter Baldwin, Nicholas Bellasis, Ralph Busch, Regina Carter, John Day, Gerald Droz, Larry Edde, Steven Edwards, Salvatore Marra, Tomlyn Winn, and Alliant Insurance Services, Inc., to seal;

(2) By Defendants/Cross Complainants Aon Risk Services Companies, Inc., Aon Risk Insurance Services West, Inc., Aon plc, Defendant Aon Group, Inc., and Cross Complainant Aon to permit Brett Ingerman to appeal as counsel pro hac vice;

Tentative Ruling:

To deny both motions, without prejudice.

Any new hearing date must be obtained pursuant to The Superior Court of Fresno County, Local Rules, rule 2.2.1.

Explanation:

Motion to seal

Once a party is required to file documents electronically in an action, the party must also *serve* them electronically as well. (Cal. Rules of Court, rule 2.251(c).) Here, electronic filing in civil unlimited cases became mandatory in Fresno County as of July 1, 2016. (Fresno County Sup.Ct., Local Rules, rule 4.1.13.) Consequently, the motion to seal was required to have been served electronically. The proof of service filed on July 29, 2016, indicates that the moving papers were served by express mail/overnight delivery. Since the motion is unopposed, the defect is not waived. (See *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7.)

Pro hac vice application

Applications to appear pro hac vice must be served on all parties, including the State Bar of California, by *mail*. (Cal. Rules of Court, rule 9.40(c)(1).) Here, the proof of service filed on August 16, 2016, indicates that the parties were not served by mail. Further, the proof of service does not list the State Bar of California.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 09/06/16.

(Judge's initials) (Date)

(28) Tentative Ruling

Re: ***Mora v. PUSD, et al.***

Case No. 16CECG02171

Hearing Date: September 7, 2016 (Dept. 403)

Motion: By Plaintiff to Amend Complaint

Tentative Ruling:

To grant the motion.

Plaintiff is directed to file and serve a document with the proposed changes, entitled "First Amended Complaint," within ten court days of the date of this order. All the changes shall be set in **boldface typeset.**

Explanation:

The Court notes that there appears to be no opposition or reply brief on file for this motion.

Plaintiff has filed a motion for leave to amend that appears to propose no substantive changes, but merely seeks to clarify the identity of various parties, as well as to amend the caption.

Judicial policy favors resolution of all disputed issues between parties in the same lawsuit, therefore the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) A plaintiff must also attach a declaration specifying "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier." (Cal. Rule of Ct. 3.1324, subdivision (b).).

Plaintiff has filed a declaration that meets the requirements of Rule of Court 3.1324, subdivision (b). Therefore, the motion for leave to amend is granted.

Plaintiff is directed to file and serve a document with the proposed changes, entitled "First Amended Complaint" within ten court days of the date of this order. All the changes shall be set in **boldface typeset.**

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The

minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 09/06/16.

(Judge's initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Minjares v. City of Fresno***
Case No. 15 CE CG 01247

Hearing Date: September 7th, 2016 (Dept. 501)

Motion: Defendants' Motion for Summary Adjudication

Tentative Ruling:

To deny the defendants' motion for summary adjudication, as it has been brought improperly without a stipulation between the parties. (Code Civ. Proc. § 437c, subd. (t).) Also, the court intends to set aside its prior order granting leave to file the motion, as it was granted under the mistaken belief that the parties had stipulated to file the motion.

Explanation:

Under Code of Civil Procedure section 437c, subd. (t), "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision."

However, "Before filing a motion pursuant to this subdivision, the parties whose claims or defenses are put at issue by the motion shall submit to the court both of the following: (i) A joint stipulation stating the issue or issues to be adjudicated. (ii) A declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement." (Code Civ. Proc., § 437c, subd. (t)(1)(A)(i), (ii).)

In addition, "The notice of motion shall be signed by counsel for all parties, and by those parties in propria persona, to the motion." (Code. Civ. Proc. § 437c, subd. (t)(4)(B).)

In the present case, defendants City of Fresno and Jaspinder Chauhan filed a "stipulation" to allow the filing of the motion, but plaintiff and his counsel refused to stipulate to the motion. Indeed, defendants admitted in the purported stipulation that the plaintiff would not stipulate to the filing of the motion. Thus, there was no actual stipulation, as only the moving defendants had consented to the filing of the motion. Also, plaintiff did not sign the notice of motion or submit a declaration in support of the motion stating that the motion would further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement, as required under section 437c, subdivision (t).

Consequently, the court's order granting leave to file the motion was improper and should not have been granted. The court was under the mistaken impression that the parties had both agreed to file the motion at the time it granted the order. Therefore, the court intends to set aside its May 31st, 2016 order granting leave to file the motion. The court also intends to find that the motion for summary adjudication has been improperly brought without a stipulation, and it will therefore deny the motion.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***The State of California v. Yuyama, et al.***
Case No. 16 CE CG 01313

Hearing Date: September 7th, 2016 (Dept. 501)

Motion: Plaintiff's Motion for Order of Possession

Tentative Ruling:

To grant the plaintiff's motion for an order of possession as to the subject parcels. (Code Civ. Proc. § 1255.410, subd. (a).)

Explanation:

The plaintiff has established all of the required elements to allow it to obtain an order for prejudgment possession of the parcels under Code of Civil Procedure section 1255.410, subdivision (a). Plaintiff is a public entity with the right to take property by eminent domain. It obtained a resolution of necessity from the State Public Works Board on March 11th, 2016, thus establishing that the project is necessary, that is it planned and located in a manner that is most compatible with the public good and least private injury, and that the property to be acquired is necessary for the project. The plaintiff has also deposited the probable amount of compensation, $116,200, with the State Treasurer.

In addition, plaintiff has shown that there is an overriding need for it to possess the property in order to complete the High Speed Rail project. The plaintiff will also suffer substantial harm if the project is delayed, since it will incur delay costs if the project does not go forward, as well as risking the loss of federal funding for the project. Therefore, plaintiff has met its burden of showing the basic elements of its claim for an order of prejudgment possession.

None of the defendants have filed opposition, despite being served with notice of the motion more than 90 days before the hearing on the motion. Therefore, the court intends to grant the motion for possession of the property.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Ghadrdan v. Ghondaghsazan***
Court Case No. 15CECG02624

Hearing Date: September 7, 2016 (Department 501)

Motion: by plaintiffs and cross-defendants for protective order barring production of documents by JP Morgan Chase Bank

Tentative Ruling:

To deny motion, but to order production subject to the existing protective order. To award sanctions in the amount of $1,800.00.

Explanation:

1. No Privacy for a Business

The bank account in question was for a commercial venture, Samara Investments. Several California cases hold there is therefore no constitutional right of privacy for such entities. *Roberts v. Gulf Oil Corp*. (1983) 147 Cal. App. 3d 770, 791, had this to say: "The provision simply does not apply to corporations, as it refers to 'people' and nowhere in the statutes of California or elsewhere has the word 'people' been defined to include corporations." The U.S. Supreme Court found that the term "personal privacy" necessarily excluded corporations as having privacy rights under the Freedom of Information Act in *FCC v. AT&T, Inc.* (2011) 562 U.S. 397, 131 S. Ct. 1177; 179 L. Ed. 2d 132. Corporations are accorded a privilege for certain materials – those that could constitute trade secrets.

There are also cases that claim corporations have a privacy right, but that it is not as strong and does not derive from the Constitution. See *Ameri-Medical Corp. v. Workers Comp. Appeals Board* (1996) 42 Cal. App 4th 1260, 1287-1288 and *SCC Acquisitions, Inc. v. Superior Court* (2015) 243 Cal. App. 4th 741. However, those cases did not analyze how Evidence Code section 911 would affect their finding of a non-constitutional, Court-created privilege. Same states:

> "Except as otherwise provided by statute:
> (a) No person has a privilege to refuse to become a witness.
> (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
> (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing."

"In California, except as otherwise provided by statute no person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." *Allen Radford Co. v. Superior Court* (1989) 216 Cal. App. 3d 1418, 1419, 1423.

That Court found that the parties to a settlement agreement could not deem it confidential and exempt from discovery by other parties, relying on Evidence Code section 911. Accord *Mediplex of California, Inc. v. Superior Court* (1995) 34 Cal. App. 4th 748. The United States Supreme Court has confirmed that private parties do not have the power to shield information from disclosure that is otherwise not privileged. *Baker v. General Motors Corp* (1998) 522 U.S. 222.

Samara Investments, LLC does not have a right of privacy to assert. It has also failed to meet the standards for claiming a trade secret. Proof required show a trade secret exists must consist of admissible evidence of the following elements:

> "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Uribe v. Howie (1971) 19 Cal. App. 3d 194, 208. This case was cited by the California Supreme Court on the trade secret issue in 2004. See *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal. 4th 1029, 1039. See also *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal. App. 3d 1327, 1345.

2. Relevancy

In *Doak v. Superior Court* (1968) 257 Cal. App. 2d 825, the question was whether a defendant was subject to financial discovery solely to determine if he could pay the damages sought. *Rawnsley v. Superior Court* (1986) 183 Cal. App. 3d 86 provides that discovery on financial issues is permitted where related to some other issue in case besides the ability to pay damages. "Unlike the situation in which a plaintiff seeks to discover defendant's financial status solely for the purpose of assessing a punitive damages claim, the documents sought by petitioner here are fundamental to his case. He alleges that assets have been converted and diverted from the entities in which he has an interest to the individual defendants or to corporations which are the alter egos of the individual defendants." (Id. at 91.)'

Thus the question becomes whether the information is sought for a reason aside from seeing if Samara Investments, LLC has the money to pay any judgment. The answer to that question is yes, as there is evidence of money movement between the account previously designated as that for Samara Investments, LLC Riverdale (no. 9688) and Samara Investments, LLC (No. 0306), as well as with other Samara LLC accounts. There is also evidence that more than one account was designated as the Riverdale part of Samara Investments, LLC, and that loans were made between the two. There is an allegation of alter ego, by, in part, treating the companies and the individual plaintiff as one. Exhibits 10 and 11 raise a question as to whether or not 0306 was in fact

a Riverdale account, or used in connection with the Riverdale property. Where no privilege is involved, as here, relevancy permits wide discovery.

"[F]or discovery purposes, information is relevant to the 'subject matter' of an action if the information might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement**."** *Jessen v. Hartford Casualty Ins. Co.* (5th Dist. 2003) 111 Cal. App. 4th 698, 711-712. "The burden of proof shall rest on the party who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance." *People v. Osaki* (1933) 209 Cal. 169, 183; relied on for this point in *In re Shawnn F.* (1995) 34 Cal. App. 4th 184, 197.

Sam has said that the documents showing involvement of the account and Riverdale are a mistake. Whether or not his statement is true can be verified from the documents themselves, and that makes them discoverable.

2. Protective Order

The parties have agreed to subject the documents produced to the protective order previously filed with this Court.

3. Sanctions

The Court finds that $1,800.00 in sanctions is reasonable for this motion, as many of the same issues raised were discussed in the prior motion for a protective order.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Long v. Park***
Court Case No. 16CECG01774

Hearing Date: **September 7, 2016 (Dept. 501)**

Motion: Defendant Park's Motion to Strike Portions of Complaint

Tentative Ruling:

To deny. Defendant is granted 10 days' leave to file his answer to the complaint. The time in which the answer can be filed will run from service by the clerk of the minute order.

Explanation:

Defendant's argument that plaintiff's allegations are "factually inaccurate" and "unsupported by known facts" are not germane to the analysis on a motion to strike, and are disregarded. For purposes of this motion, all allegations of fact are presumed to be true. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) If what defendant is referring to is that (according to plaintiff's counsel) defendant's impairment may not have been caused by alcohol but by narcotics, the court cannot regard these additional facts, either, in assessing the sufficiency of the pleading. Instead, the court regards these new facts as offers of proof as to what additional facts plaintiff could allege in amending if this motion were granted. Furthermore, even if the intoxicant differs from what is eventually learned in discovery, this may be the subject of a pretrial motion to amend the pleadings to conform to proof, as is often the case. This does not subject the punitive damage claim to being stricken.

In *Taylor v. Superior Court* (1979) 24 Cal.3d 890 ("*Taylor*"), the court concluded that the essential gravamen of a complaint that would sustain a prayer for punitive damages involving drunk driving was that "Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby." (*Id*. at p. 896.) The court stated: "This is the essential gravamen of the complaint, and while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases." (*Id.*)

In 1980, the Legislature amended the definition of malice in Civil Code Section 3294 to adopt the definition as stated in *Taylor.* (*Recognized in Lackner v. North* (2006) 135 Cal.App.4th 1188, 1211 ("*Lackner*").) In 1987, the statute was further amended to add a criterion for "unintentional malice" which required plaintiff to prove that the conscious disregard displayed by defendant was "despicable" and "willful." It also elevated the burden of proof to clear and convincing evidence. (See Civil Code § 3294.)

In *Lackner, supra,* the court discussed the 1987 legislative changes, and while noting that "despicable conduct was not a requirement" at the time *Taylor* was decided, noted that the circumstances alleged in *Taylor* were "far worse." (*Id.* at p. 1212, and *fn* 14.) In other words, the implication is that the conscious disregard alleged in *Taylor* sufficiently alleged *despicable* conscious disregard for the safety of others.

Here, plaintiff has alleged: 1) that Defendant voluntarily drank alcoholic beverages to the point of intoxication, which impaired his physical and mental faculties; 2) that he knew when he began to drink the alcohol that he was going to operate a motor vehicle in an intoxicated condition; 3) he was aware from the outset of the probable consequences of such conduct, and that he willfully and deliberately failed to avoid those consequences (i.e., by voluntarily drinking to the point of intoxication and then driving); and 4) that in doing so, he was acting with a conscious disregard for the rights and/or safety of Plaintiff and others.

These allegations are sufficient at the pleading stage. Recklessness, unlike negligence, involves a conscious choice of a course of action with knowledge of the serious danger to others involved in it. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31.) "The usual meaning assigned to "willful," "wanton" or "reckless"… is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689, citing to Prosser, Law of Torts (4th ed. 1971) § 34, p. 185 (internal quotes and additional citation omitted).) "It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they should follow; but this has sometimes been held not to be indispensable, <u>*so long as there is great danger known to the actor or apparent to a reasonable man*</u>." (*McDevitt v. Welch* (1962) 202 Cal.App.2d 816, 826, quoting Prosser on Torts 2d ed., 151, § 33 (emphasis added, internal quotes omitted).)

The allegation that defendant voluntarily drank to the point of intoxication, which impaired his faculties is a *specific fact*, not a "buzz word." The allegation that he knew when he began doing so that he was going to drive in an intoxicated state is also a *specific fact*. The allegation that he was aware from the start of the probable consequences of this conduct is also a *specific fact.* Furthermore, one appellate court approved the following jury instruction:

> In order to establish wilful or wanton misconduct on the part of a driver, it is not necessary to show express knowledge on his part of the probable consequences of his conduct. <u>*The driver is charged with knowledge of the probable consequences if such consequences would have been apparent to a person of ordinary prudence and intelligence.*</u> In other words, the driver's knowledge of the probability of injury to another person may be implied if the circumstances are such that a person of ordinary prudence and intelligence would have known that serious injury to another would probably result from the driver's conduct. (*Lovett v. Hitchcock* (1961) 192 Cal.App.2d 806, 811, emphasis added.)

Thus, the allegation of knowledge of probable consequences is sufficient here. Finally, the allegation that defendant acted in conscious disregard for the rights and safety of plaintiff and others is a general allegation, but this has been accepted as sufficient for pleading purposes, especially where this is supported by the other facts alleged, as here. (See, *e.g., SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 906— allegation defendants engaged in crop dusting in conscious disregard of dangers to plaintiff's crops held sufficient to support punitive damage claim on demurrer; *Magallanes v. Superior Court* (1985) 167 Cal.App.3d 878, 882-883—allegations defendant acted with conscious disregard for rights and safety of general public because it knew its drug would cause serious injury to female children of users sufficient to support punitive damage claim.)

Although it appears plaintiff has additional facts at his disposal that might further support his claim, the current allegations are sufficient to support his claim for punitive damages.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Rose v. Healthcomp, Inc.***
Court Case No. 15CECG00163

Hearing Date: **September 7, 2016 (Dept. 501)**

Motion: Plaintiff's motion to appoint successor in interest.

Tentative Ruling:

To continue to Tuesday, September 13, 2016, to allow plaintiff opportunity to file a Reply brief in response to defendant's opposition. Reply shall be filed on or before Thursday, September 8, 2016.

Explanation:

Code of Civil Procedure section 377.21 states, "A pending action or proceeding does not abate by the death of a party *if the cause of action survives*." (Emphasis added.) Code of Civil Procedure section 377.31 states, "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding *that does not abate* to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest." (Emphasis added.)

Thus, whether or not the decedent's causes of action abate or survive is a threshold issue. Plaintiff must be allowed to respond to the law presented in defendant's opposing brief before the court rules.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 09/06/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(2)

Tentative Ruling

Re: ***Jane Doe et al. v. Orange Center Elementary School et al.***
Superior Court Case No. 14CECG03347 and related cases

Hearing Date: September 7, 2016 (Dept. 502)

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 08/30/16.
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***The Neil Jones Company v. PG & E Corporation***
Superior Court No. 16CECG01727

Hearing Date: Wednesday September 7, 2016 (**Dept. 502**)

Motion: (1) Defendants' Request for Judicial Notice
(2) Defendants PG& E Company's Demurrer to Complaint
(3) Defendants PG& E Corporation's Demurrer to Complaint

Tentative Ruling:

To grant Defendant's request for judicial notice of the 2002 Service Agreement (RJN, Exhibit "1")-- as to the existence of the agreement, but *not* for the truth of statements contained in the document or its proper interpretation.

To overrule the demurrer.

Defendant is granted 10 days leave to file an answer. The time in which the answer may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

Judicial Notice

In ruling on a demurrer, a court may take judicial notice of the existence of a document, but "[t]he truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*Fremont Indem. Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 113; *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 477; *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374 ["hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable"].) Indeed, for a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. (*Fremont, supra,* 148 Cal.App.4th at pp. 114–115.) In short, "[a] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (*ibid.*)

Standing

Defendant's argument that Plaintiff lacks standing to maintain the action is based entirely on the Defendant argues that Plaintiff has no standing because it is not a party to the agreement. But, since This Court does not take judicial notice of the contents of the agreement, there will be no determination as to standing. Demurrer overruled.

Jurisdiction

Defendant first argues the agreement vests exclusive jurisdiction in the CPUC. This argument must be rejected because the court has denied the request for judicial notice as to the content of the agreement.

Defendant also argues section 1759 of the Public Utilities Code divests the court of jurisdiction. Section 1759 provides that only the California Supreme Court "shall have jurisdiction to review, reverse, correct, or annul any order or decision of the California Public Utilities Commission…or to enjoin, restrain, or interfere with the California Public Utilities Commission in the performance of its official duties…"

Trial courts only lack jurisdiction under section 1759 if: (1) the CPUC has authority to regulate the conduct at issue; (2) the CPUC has exercised that authority; and (3) the superior court action would hinder or interfere with CPUC policies or annul a CPUC decision or order. (*San Diego Gas and Elec. Co. v. Sup. Ct. (Covalt)* (1996) 13 Cal. 4th 893, 918.) Here, as a pleading matter, and at a minimum, the court cannot find that the action would hinder or interfere with CPUC policies or annul a CPUC decision or order.

PG&E Corp.

Defendants argue Plaintiff has failed to state a cause of action against PG&E Corp., which is a separate entity from PG&E. Once again, this argument relies, in part on the Request for Judicial Notice and so, to that extent, it must be rejected.

To the extent Defendants' argument does not rely on the agreement, it is based on extrinsic evidence. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) No other extrinsic evidence can be considered (i.e., no "speaking demurrers"). (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—error for court to consider facts asserted in memorandum supporting demurrer; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862 [disapproved on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287—error for court to consider contents of release which was not part of any court record].)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/06/16.
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Aujaneek Moore v. Antonio Solorio***
Superior Court No. 15CECG03017

Hearing Date: Wednesday September 7, 2016 (**Dept. 502**)

Motion: Defendants Harris Farms and Antonio Solorios' (1) motion to compel and (2) request for monetary sanctions.

Tentative Ruling:

To Grant Defendants' motions to compel responses to form and special interrogatories and to compel production of requested documents.

To Order monetary sanctions in the amount of $199.

Plaintiffs are granted 20 days to serve initial verified responses and to produce requested documents, without objections.

Explanation:

Motion to Compel – Interrogatories

Code of Civil Procedure section 2017.010 states that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action…" Code of Civil Procedure section 2030.290(b) provides for a motion to compel where the responding party fails to respond. Further, when a party has not responded to interrogatories all a moving party need show is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (Cf. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06; Cal. Rules of Court, rule 3.1345.)

Here, Defendants' form and special interrogatories seek basic information regarding Plaintiff's identity and specifics related to Plaintiffs' allegations, such as Plaintiff's insurance policies, injuries, medical treatment, medical history, medications, and loss of income or earning capacity (Piekut Dec. e-filed 8/1/16, Exs. A, C). These are all proper subjects for discovery in this case as they are "relevant to the subject matter involved…" as required under Code of Civil Procedure section 2017.010 (see Piekut Dec. e-filed 8/1/16, ¶ 16).

On March 10, 2016, Defendants properly served Plaintiffs their form and special interrogatories, and subsequently granted three extensions. The last deadline has passed and Plaintiffs *still* have not responded. Defendants' motion to compel responses to Defendants' form interrogatories set one and special interrogatories set one is granted.

Motion to Compel – Request for Production of Documents

A party is entitled to obtain discovery regarding any unprivileged matter that is relevant to the pending action. (Code Civ. Proc., § 2017.010.) Code of Civil Procedure section 2031.010, subsection (b), allows a party to an action to demand the opposing party produce relevant, unprivileged documents for inspection and copying. A party who has propounded a request for documents may move for a motion to compel where the opposing party fails to timely respond. (Code Civ. Proc., § 2031.300.) When a party has not responded to requests for production, the opposing party waives all objections, including privilege and work product. (Code Civ. Proc., § 2031.300.)

Here, Defendants' request for production of documents seeks documents that Plaintiff likely has, including accident records, reports and witness statements. In addition, Defendants seek Decedent's medical records, medical bills, photographs, witness transcripts, writings/documents establishing Plaintiff's loss of income, and bills/estimates/payments made establishing economic damages claimed by Plaintiffs. These are all proper subjects for discovery in this case as they are "relevant to the subject matter involved…" as required under Code of Civil Procedure section 2017.010 (*again see* Piekut Dec. e-filed 8/1/16, ¶ 16). And while some of the information could arguably be privileged (e.g., certain medical information), Plaintiffs have waived all objections by failing to respond. (Code Civ. Proc., § 2031.300.)

On March 10, 2016 Defendants properly served Plaintiffs their request for production of documents, and granted three extensions. Again, the last deadline has past and Plaintiffs are unresponsive. Defendants' motion to compel production of documents, set one is granted.

Sanctions

Failing to respond or to submit to an authorized method of discovery is a misuse of the discovery process. Where the court finds a misuse of the discovery process, it may, after notice to the impacted party and opportunity for hearing, impose a monetary sanction ordering the person engaging in such misuse, or any attorney advising such conduct, or both, to pay the reasonable expenses, including attorney's fees, incurred by the other party as a result of the offending party's behavior. (Code Civ. Proc., §§ 2023.010; 2023.030.) Further, the court shall impose a monetary sanction against the party opposing the motion to compel *unless* it finds that party acted "with substantial justification" or other circumstances render the sanction "unjust." (Code of Civ. Proc. §2030.290, subd.(c) (interrogatories); §2031.300, subd.(c)(requests for production).)

Here, Plaintiffs have provided no objections to any of Defendants' discovery requests, so there is no apparent justification for Plaintiff's failure to respond. Defense counsel is asking for sanctions in the amount of $199, for expenses incurred relating to this motion: Defense paralegal spent two hours preparing the motion ($130), Defense counsel spent 12 minutes reviewing it ($29.40), and $40 to file. This is a reasonable request; sanctions are ordered in the amount of $199.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/06/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Foster v. CSAA Insurance Exchange***
Court Case No. 16CECG02168

Hearing Date: September 7, 2016 (Department 502)

Petition: to compel arbitration of under-insured motorist claim

Tentative Ruling:

To grant.

Explanation:

In their filings, the parties have agreed that arbitration is appropriate in this matter.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 09/06/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503